

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

DEVELL MOORE,

Plaintiff,

v.

MARY K. HOLSTUS, *et al.*,

Defendants.

Case No. 3:25-CV-00316-MMD-CLB

**REPORT AND RECOMMENDATION OF
U.S. MAGISTRATE JUDGE¹**

Before the Court is Plaintiff Devell Moore's ("Moore") motion to proceed *in forma pauperis*, (ECF Nos. 1, 4), *pro se* civil rights complaint (ECF No. 1-1 at 1-5, 11-17), and motion for counsel, (ECF No. 1-1 at 6-10). For the reasons stated below, the Court recommends that the *in forma pauperis* application, (ECF No. 1), be denied as moot, the complaint, (ECF No. 1-1), be dismissed without prejudice and without leave to amend, and the motion for counsel, (ECF No. 1-1), be denied as moot.

I. *IN FORMA PAUPERIS* APPLICATION

A person may be granted permission to proceed *in forma pauperis* ("IFP") if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

Pursuant to LSR 1-1: "Any person who is unable to prepay the fees in a civil case may apply to the court for leave to proceed [IFP]. The application must be made on the form provided by the court and must include a financial affidavit disclosing the applicant's

¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 income, assets, expenses, and liabilities.”

2 “[T]he supporting affidavit [must] state the facts as to [the] affiant’s poverty with
3 some particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th
4 Cir. 1981) (quotation marks and citation omitted). A litigant need not “be absolutely
5 destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*,
6 335 U.S. 331, 339 (1948). An inmate submitting an application to proceed IFP must also
7 “submit a certificate from the institution certifying the amount of funds currently held in the
8 applicant’s trust account at the institution and the net deposits in the applicant’s account
9 for the six months prior to the date of submission of the application.” LSR 1-2; *see also*
10 28 U.S.C. § 1915(a)(2). If the inmate has been at the institution for less than six months,
11 “the certificate must show the account’s activity for this shortened period.” LSR 1-2.

12 A review of the application to proceed IFP, (ECF No. 1), and financial certificate,
13 (ECF No. 4), reveals Moore cannot pay the filing fee. However, because the Court
14 recommends that the complaint be dismissed, the Court recommends that the motion to
15 proceed IFP, (ECF No. 1), be denied as moot.

16 **II. SCREENING STANDARD**

17 Inmate civil rights complaints are governed by 28 U.S.C. § 1915A. Section 1915A
18 provides, in relevant part, that “the court shall dismiss the case at any time if the court
19 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a
20 claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant
21 who is immune from such relief.” 28 U.S.C. § 1915A(b). A complaint is frivolous when
22 “it lacks an arguable basis in either law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325
23 (1989). This includes claims based on legal conclusions that are untenable (e.g., claims
24 against defendants who are immune from suit or claims of infringement of a legal interest
25 which clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
26 delusional scenarios). *Id.* at 327–28; *see also McKeever v. Block*, 932 F.2d 795, 798 (9th
27 Cir. 1991). Dismissal for failure to state a claim under § 1915A incorporates the same
28 standard applied in the context of a motion to dismiss under Federal Rule of Civil

1 Procedure 12(b)(6), *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012), which
2 requires dismissal where the complaint fails to “state a claim for relief that is plausible on
3 its face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

4 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom*
5 *Ins. Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court must
6 accept as true all well-pled factual allegations, set aside legal conclusions, and verify
7 that the factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S.
8 662, 679 (2009). The complaint need not contain detailed factual allegations, but must
9 offer more than “a formulaic recitation of the elements of a cause of action” and “raise a
10 right to relief above a speculative level.” *Twombly*, 550 U.S. at 555. Particular care is
11 taken in reviewing the pleadings of a *pro se* party, for a more forgiving standard applies
12 to litigants not represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).
13 Still, a liberal construction may not be used to supply an essential element of the claim
14 not initially pled. *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is
15 appropriate, a *pro se* plaintiff should be given leave to amend the complaint and notice
16 of its deficiencies, unless it is clear that those deficiencies cannot be cured. *Cato v.*
17 *United States*, 70 F.3d 1103, 1107 (9th Cir. 1995).

18 **III. SCREENING OF COMPLAINT**

19 In his complaint, Moore sues Defendant District Attorney Mary K. Holstus, District
20 Court Judge James Bixler, Public Defender Kathleen Hammers, Public Defender Jennifer
21 Schwartz, and Las Vegas Metropolitan Police Department Lieutenant Camlidei
22 (collectively referred to as “Defendants”) under 42 U.S.C. § 1983. (See ECF No. 1-1.)
23 Moore sues Defendants for various claims which all seem to relate to Moore’s underlying
24 state criminal conviction. (*Id.* at 1-5, 11-17.) Moore seeks “everything that the law of the
25 land says the Court is mandated by law to give to me.” (*Id.* at 11.)

26 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority
27 to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d
28 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir.

1 2000)). The statute “provides a federal cause of action against any person who, acting
2 under color of state law, deprives another of his federal rights[.]” *Conn v. Gabbert*, 526
3 U.S. 286, 290 (1999), and is “merely . . . the procedural device for enforcing substantive
4 provisions of the Constitution and federal statutes.” *Crumpton v. Gates*, 947 F.2d 1418,
5 1420 (9th Cir. 1991). Claims under § 1983 require the plaintiff to allege (1) the violation
6 of a federally-protected right by (2) a person or official who acts under the color of state
7 law. *Anderson*, 451 F.3d at 1067.

8 However, § 1983 is not a backdoor through which a federal court may overturn a
9 state court conviction or award relief related to the fact or duration of a sentence. Section
10 1983 and “the federal habeas corpus statute . . . both provide access to the federal courts
11 ‘for claims of unconstitutional treatment at the hands of state officials, . . . [but] they
12 different in their scope and operation.’” *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir.
13 2003) (quoting *Heck v. Humphrey*, 512 U.S. 477, 48 (1994)). Federal courts must take
14 care to prevent prisoners from relying on § 1983 to subvert the differing procedural
15 requirements of *habeas corpus* proceedings under 28 U.S.C. § 2254. *Heck*, 512 U.S. at
16 486-87; *Simpson v. Thomas*, 528 F.3d 685, 695 (9th Cir. 2008).

17 When a prisoner challenges the legality or duration of his custody, raises a
18 constitutional challenge which could entitle him to an earlier release, or seeks damages
19 for purported deficiencies in his state court criminal case, which effected a conviction or
20 lengthier sentence, his sole federal remedy is a writ of *habeas corpus*. *Edwards v. Balisok*,
21 520 U.S. 641, 648 (1997); *Heck*, 512 U.S. at 481; *Wolf v. McDonnell*, 418 U.S. 539, 554
22 (1974); *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Simpson*, 528 F.3d at 692-93. Stated
23 differently, where “a judgment in favor of the plaintiff would necessarily imply the invalidity
24 of his conviction or sentence,” then “the complaint must be dismissed unless the plaintiff
25 can demonstrate that the conviction or sentence has already been invalidated.” *Heck*,
26 512 U.S. at 487.

27 It appears that Moore is challenging the constitutionality of his state court criminal
28 conviction. Consequently, he must demonstrate that his conviction has been overturned

1 to proceed in an action under § 1983. As he has not done so, his sole relief is a *habeas*
2 *corpus* action.

3 Finally, to the extent Moore is attempting to assert claims against a District
4 Attorney, these defendants are absolutely immune from suit under § 1983 as a state
5 prosecutor. See *Imbler v. Pachtman*, 424 U.S. 409, 427, 430 (1976) (state prosecutors
6 are absolutely immune from § 1983 actions when performing functions “intimately
7 associated with the judicial phase of the criminal process.”). Moreover, Defendant James
8 Bixler, the sentencing judge in Moore’s underlying criminal case, is also absolutely
9 immune from suit under § 1983. See *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th
10 Cir. 1988) (“Judges are absolutely immune from damage actions for judicial acts taken
11 within the jurisdiction of their courts.... A judge loses absolute immunity only when [the
12 judge] acts in the clear absence of all jurisdiction or performs an act that is not judicial in
13 nature.”).

14 Accordingly, the Court recommends that the complaint, (ECF No. 1-1 at 1-5, 11-
15 17), be dismissed without prejudice and without leave to amend. Based on this
16 recommendation, the Court further recommends that Moore’s motion for appointment of
17 counsel, (ECF No. 1-1 at 6-10), be denied as moot.

18 **IV. CONCLUSION**

19 For the reasons stated above, the Court recommends that the IFP application,
20 (ECF No. 1), be denied as moot, the complaint, (ECF No. 1-1 at 1-5, 11-17), be dismissed
21 without prejudice and without leave to amend, and the motion for counsel, (ECF No. 1-1
22 at 6-10), be denied as moot.

23 The parties are advised:

24 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
25 Practice, the parties may file specific written objections to this Report and
26 Recommendation within fourteen days of receipt. These objections should be entitled
27 “Objections to Magistrate Judge’s Report and Recommendation” and should be
28 accompanied by points and authorities for consideration by the District Court.

